BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID E. KANODE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,042,744
SPRINT CORPORATION	)	
Respondent	)	
AND	)	
	)	
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 28, 2011, Award of Special Administrative Law Judge Jerry Shelor (SALJ). Claimant was awarded benefits for a permanent total disability after the SALJ found that claimant had suffered personal injury by accident which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Mark S. Gunnison of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Daniel N. Allmayer of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the SALJ. The parties stipulated at oral argument to the Board that all objections including the objections to the admissibility of medical reports in this matter are waived and the Board can now consider all medical evidence in this record pertinent to claimant's alleged accident. The Board heard oral argument on July 20, 2011. E. L. Lee Kinch, of Wichita, Kansas, was appointed as a Board Member Pro Tem in this matter to serve in place of former Board Member Julie Sample.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent raises several sub-issues under this heading.

   A. Respondent contends that claimant tripped due to a preexisting knee problem as his knee popped while he was walking, causing him to fall. The accident was, therefore, not compensable. Claimant contends that he missed a step due to the bright sun, and any pop in his knee occurred after the initial trip had already occurred.

   B. Respondent also contends that claimant's testimony that the sun was in his eyes is not credible as it was about 1:30 in the afternoon. Claimant counters that the sun was bright and he was exiting a dark hallway. This led to claimant being unable to see the step which led to the fall.

   C. Respondent contends that claimant was on his lunch break and was actually on a personal errand at the time the accident occurred. Therefore, the accident and resulting injuries would not be compensable. Claimant contends that he was on respondent's premises, proceeding to his vehicle with a friend and was planning to go to lunch at the time of the accident.

   D. Respondent disputes claimant's claim that he was leaving respondent's property to go to lunch, which would bring the "going and coming" rule of K.S.A. 2008 Supp. 44-508(f) into play. Claimant argues that the "premises exception" to the "going and coming" rule makes this injury compensable as claimant was still on respondent's property.

   E. Respondent claims that claimant had not left the premises and there is no evidence that he planned to do so. Therefore, the "going and coming" rule and the "premises exception" would not apply to this injury. Instead, claimant was simply on his lunch break and injuries on a lunch break are not compensable as a general rule. Claimant contends that the "personal comfort doctrine" would render this injury compensable, notwithstanding the fact that he was on his lunch break. Respondent disputes the applicability of the personal comfort doctrine to a lunch break.

2. What is the nature and extent of claimant's injuries and resulting disability? Respondent contends that claimant is capable of obtaining employment in the open labor market and should be limited to a scheduled injury award to the right

shoulder and a scheduled injury award to the right knee. Claimant contends that as a result of these injuries, when combined with claimant's other health problems, has rendered claimant permanently and totally disabled and the Award of the SALJ should be affirmed.

FINDINGS OF FACT

Claimant worked for respondent as a Technician 3. He testified that he was essentially on the phone and the computer all day. Claimant suffers from diabetes and states that because of the length of his drive in the mornings, by the time he got to work his ankles were swollen. He, therefore, at times used a cane. He testified that he rarely used the cane at work other than to get from the parking garage to his office on the fourth floor of Building 6220 on respondent's campus. His supervisor, Peggy Wheaton, however, testified that she observed claimant using the cane about half the time at work when he went to the restroom, went to lunch, or left the building to smoke.

On October 1, 2008, claimant had a lunch engagement with a co-worker, Wendy Gish. Ms. Gish did not work on respondent's campus but had made arrangements to work in Building 6220 that afternoon so that she and claimant could go through some boxes of clothing, left to them by a deceased co-worker, and then go to lunch. Ms. Gish had arranged to get to Building 6220 at about 12:30 p.m. Because he is diabetic, at about 11:00 a.m., claimant left the office and went to the cafeteria and got a bowl of soup. He brought the soup back to his desk and ate the soup while continuing to work.

Sometime around 1:00 p.m., claimant and Ms. Gish left Building 6220 on their way to the parking garage where claimant had parked his vehicle. Claimant did not take his cane. The boxes of clothing were in the front seat of claimant's vehicle. Claimant and Ms. Gish had intended to transfer the boxes of clothing to Ms. Gish's vehicle and at some point go through them to decide if they wanted any. They had made no decision as to whether they would go through the clothing before or after they ate lunch, nor had they decided whether they were going to eat lunch on or off respondent's campus.

As they walked out of Building 6220, Ms. Gish remembered that she had forgotten her keys and returned to the building to get them. Claimant then walked over to a designated smoking area and smoked a cigarette while waiting for Ms. Gish to return. When Ms. Gish returned after getting her keys, claimant and she reunited and again started to walk toward the parking garage. However, as they turned a corner while leaving a dark hallway, both were blinded by the bright sunlight and were unable to see two steps leading down. Ms. Gish testified that she lost her footing and stumbled, but was able to catch herself before falling. Before she could warn claimant, however, he stepped out, but there was nothing under his foot and he lost his balance and fell. Claimant suffered a fracture to his right leg just below the kneecap, and injuries to his right shoulder. He has

had surgery on his leg and his shoulder, and he was hospitalized from October 1 until December 5, 2008.

Both claimant and Ms. Gish testified that on the date of his accident, claimant had no difficulty walking. Neither his ankles nor his knees were bothering him, and he had no sensation of pain before missing the step. Although Ms. Wheaton testified that claimant struggled when he did not use his cane while walking, she admitted that she was not present when the accident occurred. She had no facts to suggest that anything occurred other than that claimant missed a step, lost his balance, and fell. The parties stipulated that claimant's accident occurred on respondent's premises.[1]

Claimant was taken by ambulance to the Overland Park Regional Medical Center (Overland Park) for treatment. He had pain in his right shoulder, right knee and right wrist. X-rays revealed a fracture of the lateral tibial plateau in his right knee and a comminuted fracture of the proximal humerus in the right shoulder. An x-ray of the right wrist was negative.

Claimant came under the care of orthopedic surgeon Robert Pierron, M.D., who performed surgery on claimant's right knee, including an open reduction and internal fixation of the right lateral tibial plateau. A lateral tibial plate was applied, along with three screws proximally and one screw angled distally. Claimant then underwent a closed reduction of the fractured proximal right humerus. Claimant remained in the hospital for several days and was then referred to Mid-America Rehabilitation Hospital (Mid-America). Claimant underwent extensive rehabilitation on both the shoulder and knee. However, x-rays taken several weeks after claimant's injury indicated that the right shoulder had dislocated. It was recommended that claimant return to Overland Park and undergo a second surgery, this time with an open reduction procedure rather than the closed procedure utilized with the first surgery. Claimant was recommended to return to Mid-America. However, it was determined that he needed a supervised assisted environment for two weeks and was sent to a nursing home instead. Apparently claimant's stay at the nursing home was extended beyond the two-week period. He was released to return home in early December 2008.

Claimant returned to Dr. Pierron on January 21, 2009. X-rays at that time displayed an apparent healing shoulder and knee. Physical therapy was recommended. Claimant was referred to College Park Physical Therapy and remained there in the month of February 2009. His shoulder became more painful. Dr. Pierron's examination on February 22, 2009, displayed little improvement in claimant's range of motion. An arthrogram of the right shoulder on March 11, 2009, displayed residual angular deformity of the proximal humerus. Dr. Pierron indicated he did not plan any future surgery but recommended continued home therapy for the range of motion limitations in claimant's shoulder.

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[1] P.H. Trans. at 12.

Claimant's prior medical history is significant for recurrent myocardial infarction/heart catheterization, coronary artery disease, migraines, diabetes, hypertension and repeat episodes of angina. An MRI in October 2006 indicated a right knee sprain with mild degenerative changes. The medical records indicate that claimant made an uneventful recovery from a mild sprain of the cruciate ligament in the posterior horn of the medial meniscus of his right knee in 2006.

On examination on June 29, 2009, Dr. Pazell found that claimant had a full range of motion of the left shoulder but was extremely limited in his right shoulder range of motion. His right knee displayed limited range of motion and instability. Claimant has a 19 percent permanent partial functional impairment to the right upper extremity at the shoulder for the anatomical loss, and an additional 20 percent to the shoulder due to strength loss, for a total impairment to the right upper extremity of 35 percent. However, Dr. Pazell admitted at this deposition that the strength index loss should be 10 percent rather than 20 percent and the overall impairment was then reduced to 27 percent of the right upper extremity. Dr. Pazell rated claimant's right knee at 25 percent of the lower extremity for the tibial plateau fracture and the degree of angulation, and an additional 25 percent for cruciate instability. This resulted in a total impairment of the right lower extremity of 44 percent. All ratings were determined pursuant to the fourth edition of the AMA *Guides*.[2] Claimant was restricted to sitting for only 1 to 2 hours before standing. But claimant had to shift his weight every 10 to 15 minutes. Claimant could only stand for 10 minutes before experiencing pain. Claimant has difficulty ambulating, cannot use his right arm and has trouble moving his shoulder. Dr. Pazell opined that he could think of nothing that claimant could do that would get him a job. Dr. Pazell noted that claimant cannot sit for prolonged periods of time and must get up and move around. However, claimant cannot do this because of his knee.

The medical records provided to Dr. Pazell indicated that claimant was experiencing right knee problems for several weeks in 2006. Claimant had reported that his right knee was giving out and he was having problems walking. At that time claimant was wearing an orthopedic boot. Claimant also had swelling in his legs, with the left being greater than the right. But, claimant did report occasional burning in the right leg. Claimant had reported a history of falling as early as April 2005. When claimant testified in this matter, he noted that he used his cane when he first arrived at work because he had a long drive to the job. His ankles would swell and he used the cane as a precaution. Claimant would, at times, use the cane when he went to lunch and at other times go without the cane. Claimant was making an effort to walk more. In the August 15, 2008, medical note of Dr. Ramon S. Enriquez, it was noted that claimant was walking a mile or so on a regular basis.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred by respondent to Steven L. Hendler, M.D., for an examination on August 14, 2009. The history of the accident provided to Dr. Hendler is consistent with claimant's testimony in that claimant reported that he came around a corner and was temporarily blinded by the sun. Claimant did not see a step and fell. During the physical examination, Dr. Hendler noted that clamant walked with an abnormal gait, with or without a cane. Claimant's prior history indicated uncontrolled diabetes and diabetic neuropathy in 2005, and an abnormal MRI of the right knee in 2006. In April 2007, claimant reported to Dr. Enriquez that he was still using a knee brace, and claimant was still using the cane at the August 14, 2009, evaluation by Dr. Hendler. Dr. Hendler's history of the accident did indicate the pop in the knee occurred prior to the fall. He testified that the knee popping prior to the fall could be consistent with an imbalance problem. However, Dr. Hendler acknowledged that he did not know if the popping occurred before or after claimant missed the step, but before claimant actually hit the ground.

Dr. Hendler rated claimant at 20 percent to the right upper extremity and 25 percent to the right lower extremity. Both ratings were pursuant to the fourth edition of the AMA *Guides*.[3] In a separate letter dated November 4, 2010, Dr. Hendler restricted claimant to sedentary work. Claimant would be limited in performing activities above shoulder level and would be limited in performing standing or walking beyond the occasional level.

Claimant was referred by his attorney to vocational expert Michael J. Dreiling on February 1, 2010. Mr. Dreiling reviewed medical reports from Dr. Pierron and Dr. Pazell. He also interviewed claimant regarding his past school and job training as well as his past employment history. He noted that claimant was a high school graduate with only one year of vocational-technical training some 37 years before. Claimant had acquired certain transferable skills while working, but these skills were of questionable benefit in a future job search. Claimant displayed significant medical disabilities as the result of his job injury and preexisting health conditions. Plus, the medication claimant was forced to use since the accident created side effects including a loss of alertness and the inability to perform prolonged concentration activities.

At the time of the interview, claimant was receiving Social Security disability benefits and had been laid off from his job of 20 years by respondent. Claimant's ongoing pain complaints impacted his ability to perform any type of job requiring prolonged sitting or standing. Mr. Dreiling noted that claimant's best chance of employment would have been to maintain employment with respondent, which claimant attempted to do for a period of time after the accident. The fact that respondent had no return-to-work program and offered claimant no other job or vocational training was significant. With the current economy, the competition in the open labor market and claimant's significant medical issues and disabilities, claimant was essentially and realistically unemployable in the open

[3] AMA *Guides* (4th ed.).

labor market. Mr. Dreiling noted that claimant was pursuing employment, having attended between 20 to 30 job interviews. But, claimant has had no offers of employment.

Claimant was referred by respondent to vocational expert Mary Titterington on July 19, 2010. Claimant appeared at the interview utilizing a walker, just as he had with Mr. Dreiling. Ms. Titterington reviewed numerous medical records detailing claimant's past medical history. She was made aware of claimant's past and ongoing medical problems including the heart problems, diabetes and hypertension, and past physical injuries. Ms. Titterington noted Dr. Pazell's concern regarding claimant's knee and the need for a total knee replacement. Claimant's right shoulder range of motion was noted as limited with a continued degeneration anticipated. A total shoulder replacement was predicted.

Claimant advised that he spent no more than 5 to 6 hours per week looking for work and had only submitted limited applications. During the interview, claimant rotated between sitting and standing on an approximately 30-minute basis. Ms. Titterington considered this appropriate for office-oriented work. She found claimant to have transferable work skills in a sedentary capacity. Claimant was not found to be essentially and realistically unemployable as he had transferable work skills, especially in the area of customer service and the use of computers. In Ms. Titterington's opinion, claimant had the ability to earn, on the average, $15.74 per hour.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the

[4] K.S.A. 2008 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[7] In *Thompson*,[8] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

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[6] *Id.* at 278.

[7] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[8] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[10]

In *Rinke*,[11] the Kansas Supreme Court stated:

> Although K.S.A. 44-508(f) generally excludes compensation if an employee is injured on the way to or from work, the statute also includes a "premises" exception to the exclusion: "An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the *premises* of the employer . . . ." (Emphasis added.)

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[12] Breaks benefit both the employer and employee.[13] In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[14]

Larson's Workers' Compensation Law § 13.05(4) (2008) states in part:

> The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

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[9] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[10] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 2, 907 P.2d 828 (1995).

[11] *Rinke v. Bank of America*, 282 Kan. 746, 753, 148 P.3d 553 (2006).

[12] *See* Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[13] *Id.; Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998): and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[14] See Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

Larson's Workers' Compensation Law, Ch. 21 (2006) states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

This general rule clearly recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. Activities which are an incident of employment are considered to arise "out of" the employment.

In *Hensley*[15], the Kansas Supreme Court categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.[16]

K.S.A. 2008 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2008 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[17]

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[15] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[16] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[17] K.S.A. 2008 Supp. 44-508(e).

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[18]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[19]

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.[20]

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.[21]

An employee is permanently and totally disabled when rendered "essentially and realistically unemployable."[22]

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[18] K.S.A. 44-510e(a).

[19] K.S.A. 44-510c(a)(2).

[20] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, , Syl. ¶ 7, 154 P.3d 494, *reh'g denied* (2007)..

[21] *Id. at* , Syl. ¶ 8.

[22] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

ANALYSIS

There is no dispute that claimant's accident and injury occurred on respondent's premises during his lunch break. Respondent acknowledges that all its employees are required to take at least a one-half hour lunch break. Respondent argues that this case is not controlled by the personal comfort doctrine because claimant was on a lunch break as opposed to a shorter type of break. As such, respondent contends that the going and coming rule should apply. However, even under the going and coming rule, there is a premises exception. The factual situation in this case is somewhat analogous to *Rinke*. Ms. Rinke was injured as she was leaving work, walking on a covered walkway leading to the parking lot where her car was located. Because her slip and fall occurred on respondent's premises, the going and coming rule does not preclude the claimant from recovering workers compensation benefits. The factual distinction that Ms. Rinke was leaving work for the day whereas the claimant in this case was on his lunch break is immaterial. Both claimants were on their employer's premises when their accidents occurred. This was all that claimant was required to show in order to prove an exception to the going and coming rule.

The Board agrees with respondent that leaving work at lunch is generally not within the purview of the personal comfort doctrine. Instead, the going and coming rule is applicable to leaving or returning to work from a lunch break. The fact that claimant's accident occurred on respondent's premises is an exception to the going and coming rule. Should a worker remain on the premises for the lunch break, then the going and coming rule would not apply. Whether the personal comfort doctrine applies will depend upon the circumstances.

It must be determined whether claimant intended to leave respondent's premises for lunch or remain there. While both claimant and Ms. Gish are vague as to their intentions, it appears that they were intending to actually go to lunch after the clothing was split up. The Board finds that claimant and Ms. Gish intended to leave respondent's property and obtain lunch at some other location. Therefore, the "going and coming" rule along with the premises exception would apply.

Claimant was on his way to the parking lot when he decided to smoke a cigarette while he waited for Ms. Gish to get her keys. He then headed for the closest designated smoking area. He had finished his cigarette and resumed his trip to the parking garage when he fell. The premises exception applies to these facts. The travel to and from lunch, while on respondent's premises, is in the course of employment.

Finally, respondent contends that claimant's injury did not arise out of his employment because walking and being blinded by the sun are activities of day-to-day living. K.S.A. 2008 Supp. 44-508(e) excludes injuries "where it is shown that the employee suffers disability as a result of . . . the normal activities of day-to-day living." Claimant was

not injured because he was walking or because he had sun in his eyes. He was injured and suffered disability because he fell down stairs and landed on concrete. Falling down stairs onto concrete is not an activity of day-to-day living. Moreover, claimant's resulting injuries and disabilities were not due to a personal condition as in *Boeckman.*[23]

Respondent argues that claimant's story of the sun being in his eyes is not credible as it was about 1:30 in the afternoon when the accident occurred. Therefore, the sun would be high in the sky and not in claimant's eyes. However, after reviewing the record, it is apparent that claimant did not say the sun was directly in his eyes. He testified that the sunlight was bright as he exited the darker hallway. This is entirely possible on a bright sunny day. Ms. Gish's testimony corroborates this.

Claimant's accident was not the result of a personal risk or an unexplained fall.[24] It was the result of his leaving a darkened hallway into bright sunlight. Both claimant and Ms. Gish missed the step due to this sudden change in their ability to see, leading to the accident. And because claimant's injuries and resulting disability were caused by his accident, they are compensable.

The SALJ, while discussing the functional impairments of claimant's right knee and right shoulder, failed to make a finding regarding what, if any, functional impairments claimant may have suffered from this accident. Both Dr. Pazell and Dr. Hendler determined that claimant suffered permanent impairments to the right upper extremity and the right lower extremity. Not surprisingly, Dr. Pazell, claimant's hired expert, rated claimant's extremities at a higher percent than did respondent's hired expert, Dr. Hendler. However, neither expert's opinions appear to be out of line with the injuries suffered by claimant. Therefore, the Board finds that neither expert's opinions carry more weight or are more persuasive than the other. As such, the Board will utilize both opinions, averaging same. The Board finds that claimant has suffered a 34.5 percent functional impairment to the right lower extremity at the level of the knee and a 23.5 percent functional impairment to the right upper extremity at the level of the shoulder, all from the accident on October 1, 2008.

Claimant has suffered significant injuries as the result of the fall on October 1, 2008. He has undergone three surgeries and has serious limitations to both his right upper extremity and right lower extremity. Plus, claimant has significant preexisting conditions which seriously impact his health. These facts, when added to the layoff from respondent, have placed claimant in a precarious employment position. While he appears to desire

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[23] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972); see also *Bryant v. Midwest Staff Solutions, Inc.*, ___ Kan. ___, ___ P.3d ___ (No. 99,913 filed July 29, 2011).

[24] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009); *Guhr v. Menonite Bethesda Society, Inc., d/b/a Bethesda Home*, Docket No. 210,727, 1997 WL 803442 (Kan. WCAB Dec. 19, 1997).

employment, his situation is not conducive to success. In fact, his labors in that regard have been wholly unsuccessful. It is not surprising that employers would be reluctant to employ a person with such severe restrictions and ongoing health problems. Mr. Dreiling opined that, given all of these factors, claimant is permanently and totally disabled. Claimant's injuries combine, under the analysis of *Casco*, to create a presumption that he is permanently and totally disabled. Respondent has failed, in this record, to rebut that presumption. The Board finds that claimant is essentially and realistically unemployable and is thus permanently and totally disabled. The Award of the SALJ finding that claimant is permanently and totally disabled is affirmed.

CONCLUSIONS

Claimant's injuries suffered in a trip and fall on steps on respondent's premises during his break are compensable as an accident which arose out of and in the course of his employment with respondent. As the result of that fall, claimant has suffered a 23.5 percent functional impairment to his right upper extremity at the level of the shoulder and a 34.5 percent functional impairment to his right lower extremity at the level of the knee. In addition, respondent has failed to rebut the presumption that claimant is permanently and totally disabled as the result of the accident on October 1, 2008. The Award of the SALJ is modified to find that claimant suffered a 23.5 percent functional impairment to the right upper extremity and a 34.5 percent functional impairment to the right lower extremity at the level of the knee, but affirmed in all other regards.

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be modified as above noted and affirmed in all other regards.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own insofar as they do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Jerry Shelor, dated March 28, 2011, should be, and is hereby, modified as above noted and affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David E. Kanode, and against the respondent, Sprint Corporation, and its insurance carrier, American Casualty Company of Reading, Pennsylvania, for an accidental injury which occurred on October 1, 2008, and based upon a weekly maximum benefit rate of $529.00.

Claimant is entitled to 13.86 weeks temporary total disability compensation at the rate of $529.00 per week or $7,331.94, followed by permanent total disability compensation at the rate of $529.00 per week not to exceed $125,000.00 for a permanent total general body disability.

As of August 3, 2011, there would be due and owing to claimant 13.86 weeks of temporary total disability compensation at the rate of $529.00 per week in the sum of $7,331.94, plus 134.14 weeks of permanent total disability compensation at the rate of $529.00 per week in the sum of $70,960.06, for a total due and owing of $78,292.00, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $46,708.00 shall be paid at $529.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark S. Gunnison, Attorney for Claimant
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Marcia Yates Roberts, Administrative Law Judge